

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 837

SMITH BETTS, PETITIONER.

VS.

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND

ON WRIT OF CERTIORARI TO THE HONORABLE CARROLL T. BOND,
A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE
COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE
MORE

PETITION FOR CERTIORARI FILED JANUARY 3, 1942.

CERTIORARI GRANTED FEBRUARY 16, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**BEFORE THE HONORABLE CARROLL T. BOND, A
JUDGE OF THE STATE OF MARYLAND**

SMITH BETTS, Petitioner,

v.

**PATRICK J. BRADY, Warden of the Penitentiary of Maryland,
Respondent**

PETITION FOR WRIT OF HABEAS CORPUS—Filed August 29, 1941

**To the Honorable Carroll T. Bond, Chief Judge of the
Court of Appeals of Maryland:**

The petition of Smith Betts for a writ of habeas corpus respectfully represents unto your Honor:

1. That your petitioner is a citizen of the State of Maryland, and is now incarcerated and restrained of his liberty in the Maryland Penitentiary at 954 Forest Street, Baltimore, Maryland, in the custody of the respondent herein, Patrick J. Brady, Warden of said institution.

2. That your petitioner is informed and believes that the said incarceration and restraint of his liberty are solely under color of the authority of a certain sentence pronounced by Judge William H. Forsythe, Jr., Judge of the Circuit Court for Carroll County, the said sentence being for a term of eight years.

3. The facts surrounding the presentment, arraignment, conviction and sentence of your petitioner are as follows:

(a) Your petitioner was presented for robbery on May 9th, 1939. The same day indictment was filed and a true bill issued. On May 12th, 1939 your petitioner was arraigned before the said William H. Forsythe and pleaded "not guilty". At the same time your petitioner advised the Court that he was a pauper, and was without funds to [fol. 2] employ counsel, and your petitioner then requested the Court to appoint counsel to represent, aid, advise and defend him. Judge Forsythe advised your petitioner that he would not appoint counsel for him in this matter because the Court only appointed counsel for indigent defendants when they were charged with murder, manslaughter or rape.

(b) Your petitioner was unable to obtain counsel due to lack of funds, and no counsel had been appointed by the Court. Accordingly, the trial of your petitioner proceeded without his having the assistance of counsel in the defense of his case. Your petitioner maintains that he was truly innocent of the said charge of robbery. Thereupon on May 17th, 1939 your petitioner having withdrawn an application for a jury trial which he had previously filed, was tried before the Court, and on the same day there was a verdict of the Court of guilty, and on the same day there was a judgment and sentence of the Court that the defendant Smith Betts be confined in the Maryland Penitentiary for a period of eight years.

(c) At no time during the proceedings did your petitioner waive his right to counsel.

4. Your petitioner believes that his present incarceration and restraint of his liberty by the respondent in the said Maryland Penitentiary, are illegal, because based upon the above mentioned judgment of conviction and sentence which is null and void for the following reasons:

(a) That your petitioner was denied the appointment of counsel to advise him, and prepare and plead his defense.

(b) Your petitioner was obliged to stand trial without the benefit of the assistance of counsel, although he asked that counsel be appointed in his behalf, and although he at no time waived his right thereto.

[fol. 3] (c) Your petitioner was denied due process of law and therefore the said Court had no jurisdiction in the premises.

(d) Your petitioner was injured in that he has been deprived of his liberty on account of a charge of robbery of which he was not guilty either in law or in fact.

5. That your petitioner is informed and believes that the said sentence imposed is void because based upon a conviction obtained in a manner contrary to the provisions of the Constitution of the United States, and especially contrary to the protective provisions of the 14th Amendment thereof, which provides that "no State shall . . . deprive any person of . . . liberty . . . without due process of law."

Wherefore your petitioner prays that he may be released from the unlawful custody and that this Honorable Court will issue a writ of habeas corpus, directing the respondent herein to produce the body of your petitioner before this Honorable Court at a time and place to be specified therein and that said respondent be required to show cause, if any he has, why your petitioner shall not be released. And your petitioner further prays that he be permitted to commence and to prosecute to conclusion the said proceedings, without being required to prepay fees or costs, or give security therefor.

Smith Betts, Petitioner; Jesse Slingluff, Jr., Attorney for Petitioner.

STATE OF MARYLAND,
City of Baltimore, ss:

I Hereby Certify that on this 28th day of August, 1941, before me, the subscriber, a notary public of the State and city aforesaid, personally appeared Smith Betts, who made oath in due form of law that he has made the foregoing petition, [fol. 4] that he knows the contents thereof, and that the allegations therein contained are true; and he further deposes and says that he is a citizen of the United States, resident of the State of Maryland; that because of his poverty he is unable to pay the costs of said action or give security for the same, and he believes he is entitled to the redress he seeks therein.

As Witness my hand and notarial seal.

Bernard J. Schulte, Notary Public.

[fol. 5] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

[Title omitted]

ORDER TO SHOW CAUSE—August 29, 1941

Upon the foregoing petition and affidavit it is this 29th day of August 1941 by the Court of Appeals of Maryland Ordered that Patrick J. Brady, Warden of the Maryland Penitentiary be and he is required to show cause, if any he has, on or before the 15th day of September 1941, why the writ of habeas corpus requiring him to produce the body

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of Smith Betts before me, should not issue, provided a copy of this order be served upon him on or before the 30th day of August, 1941;

Carroll J. Bond, Judge.

[fol. 6] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

[Title omitted]

ANSWER OF RESPONDENT—Filed September 15, 1941

To the Honorable Carroll T. Bond, Chief Judge of the
Court of Appeals of Maryland;

The answer of Patrick J. Brady, Warden of the Maryland Penitentiary, to the petition heretofore filed in the above entitled case, respectfully represents:

1. Answering paragraph 1 of said petition, your respondent admits that the petitioner is incarcerated in the Maryland Penitentiary, in the custody of your respondent, but avers that he has no knowledge as to whether or not the petitioner is a citizen of the State of Maryland.

2. Your respondent admits the allegations of paragraph 2.

3. (a) Your respondent admits the allegations of paragraph 3 (a).

(b) Answering paragraph 3 (b), your respondent neither admits nor denies that the petitioner was unable to obtain counsel due to lack of funds, but demands strict proof thereof. Your respondent admits that no counsel was appointed by the Court, and your respondent further admits that the trial of the petitioner proceeded without his having counsel. Your respondent is advised and therefore denies that the petitioner was "truly innocent of said charge of robbery," as is alleged in the petition. Your respondent admits the other averments of paragraph 3(b).

(c) Your respondent neither admits nor denies the averments of paragraph 3 (c), but demands strict proof thereof.

[fol. 7]. (d) Further answering paragraph 3, your respondent is advised and therefore avers that petitioner was informed of his right to summon witnesses to testify in his behalf, and that he availed himself of this right by summoning and calling numerous witnesses; that the trial of the petitioner was even suspended for a time so as to afford him an opportunity, through the sheriff, to bring into Court additional witnesses; that the petitioner was granted, and took full opportunity of, his right to cross-examine the witnesses against him.

Your respondent is advised and therefore avers that the guilt of the petitioner was abundantly proven beyond the slightest question of doubt; and that he was familiar with Criminal Court practice as is exhibited by his previous criminal record.

Further answering said paragraph 3, your respondent avers that the practice and procedure followed in the petitioner's case, with reference to the appointment of counsel, in nowise differed from the invariable practice followed for years in Carroll County; the petitioner's cause was treated in exactly the same manner as every other criminal case tried in the said County, and petitioner was afforded a full, fair, and complete trial on the merits of the charge against him.

4. Answering the various averments of paragraphs 4 and 5, your respondent alleges that the statements therein contained are simply conclusions of law by petitioner, and thus do not require any answer.

5. Further answering said petition, your respondent avers that the petitioner, on June 5, 1941, filed a petition for a writ of habeas corpus before the Honorable Joseph D. Mish, Associate Judge of the Fourth Judicial Circuit in Washington County, at which time substantially the same point was raised by petitioner; and that, after a hearing, the petitioner was remanded to the custody of your respondent by the said Honorable Joseph D. Mish.

[fol. 8] 6. Finally, your respondent avers that the petitioner was fully accorded all the rights and privileges guaranteed to him under both the Constitution of the United States and the Declaration of Rights and Constitution of Maryland.

Having fully answered said petition, your respondent prays that the petition for a writ of habeas corpus be dismissed.

And, As In Duty Bound, Etc.

Patrick J. Brady, Warden, The Maryland Penitentiary.

Morton E. Rome, Assistant State's Attorney for Baltimore City, Attorney for Respondent.

Duly sworn to by Patrick J. Brady. Jurat omitted in printing.

[fol. 9] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

DOCKET ENTRIES

- August 29, 1941. Petition for Writ of Habeas Corpus.
- September 15, 1941. Answer of Respondent, filed.
- September 26, 1941. Stipulation filed.
- September 26, 1941. Hearing had and testimony taken, Exhibits filed.
- October 6, 1941. Opinion of Judge, filed and order remanding prisoner filed.

[fol. 10] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

[Title omitted]

STIPULATION OF FACTS—Filed September 26, 1941

It is agreed by and between counsel for the petitioner and counsel for the respondent that the following are the true facts in the above entitled matter:

1. The petitioner was arraigned in the Circuit Court for Carroll County, before the Honorable William H. Forsythe, Jr., an Associate Judge of the Fifth Judicial Circuit for

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thirty-four years, and now Chief Judge of said Circuit and an Associate Judge of the Court of Appeals of Maryland, and at the time of his arraignment he advised the said Judge that he could not afford counsel to represent him and he requested that counsel be appointed for him; that the said Judge advised Smith Betts that it was the practice in Carroll County to appoint counsel for indigent defendants only in cases of Murder and Rape, and he refused to appoint counsel for Betts, and that Betts pleaded not guilty to the charge.

2. That the case of State of Maryland versus Smith Betts was duly called to trial five days after the said arraignment, and at said trial the case was adjourned while additional witnesses were summoned for Betts; that at said trial the several witnesses appeared and testified; that Betts was allowed to testify in his own behalf and was given full opportunity to be heard in his own defense, to examine his witnesses, and to cross-examine the witnesses [fol. 11] against him; that the certified copy of the docket entries is true and is filed herewith.

3. That it has been the practice in Carroll County since time immemorial, and to the personal knowledge of Judge Forsythe for the thirty-four years he has been on the bench to appoint counsel for indigent defendants only in cases of Murder and Rape, that is, cases involving the possibility of capital punishment.

4. That Smith Betts testified before his Honor, Judge Bond, that he, himself, could not afford counsel at the time of his trial, nor could he obtain counsel to represent him.

5. That Smith Betts testified under cross-examination that he had friends in Carroll County, having been born there; that his father had been a Minister in Carroll County; that his sister lived there, but that she refused to obtain counsel for him; that he could read and write English; that he was forty-three years of age; that in 1935 he had been convicted of Larceny and had been sentenced to serve three years in the Maryland House of Correction, on a plea of guilty.

Jesse Slingluff, Jr., Counsel for Petitioner. Morton
E. Romé, Assistant State's Attorney for the City
of Baltimore, Counsel for Respondent.

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[fol. 12] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

**Record from Circuit Court for Carroll County in Case of
State of Maryland v. Betts**

CERTIFIED COPY OF DOCKET ENTRIES, JUDGMENT AND SENTENCE

No. 1052 Criminals to May Term, 1939

1939 May 9. Presentment for Robbery fd. & B. W. issued.
Same day indictment fd. True Bill

STATE OF MARYLAND

VS.

SMITH BETTS

1939 May 12. B. W. returned "Cepi in jail" & filed.
1939 May 12. Traverser arraigned. Plea of Not Guilty.
Elected to be tried by Jury. 1939 May 17. Election of
Jury trial withdrawn & submitted and tried before the
Court. Same day verdict of the Court of Guilty. Same
day Judgment and Sentence of the Court, that the Tra-
verser, Smith Betts, be confined in the Maryland Peni-
tentiary for a period of Eight years. Same day copy of
Docket Entries, Judgment and Sentence of the Court de-
livered to the Sheriff of Carroll County to be left with the
Warden of the Maryland Penitentiary.

STATE OF MARYLAND,

Carroll County, to wit:

I hereby certify, That the above is a full and true copy
of the Docket Entries, Judgment and Sentence of the Court
in No. 1052 Criminals, State of Maryland vs. Smith Betts,
as taken from the Criminal Records of Carroll County,
Criminal Docket Liber E. M. M. Jr. No. 11, folio 129.

In Testimony Whereof, I hereto set my hand and affix
the Seal of the Circuit Court for Carroll County, this
25th day of August, A. D. 1941.

(Signed) Levi D. Maus, Clerk of the Circuit Court
for Carroll County.

[fol. 13] IN CIRCUIT COURT OF CARROLL COUNTY

INDICTMENT

STATE OF MARYLAND,

Carroll County, to-wit:

The Grand Jurors of the State of Maryland, for the body of Carroll County, do on their oaths and affirmations present that Smith Betts late of said County, on the 24th day of December, in the year of our Lord one thousand, nine hundred and thirty-eight, at Carroll County aforesaid, upon Norman Bollinger feloniously did make and assault and said Norman Bollinger in bodily fear then and there feloniously did put and Fifty-Dollars, current money, of the value of Fifty Dollars, the property of J. David Baile, trading as the Medford Grocery Company, which said current money was then and there in the possession of the said Norman Bollinger who was then and there the servant and agent of the said J. David Baile, from the person and against the will of said Norman Bollinger, then and there feloniously and violently did steal, take and carry away.

Contrary to the form of the Statute in such case made and provided and against the peace, government and dignity of the State.

[fol. 14]

Second Count

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Smith Betts, on the said day, in the said year, at the County aforesaid, feloniously did steal, take and carry away Fifty Dollars, current money, of the value of Fifty Dollars, of the monies and property of J. David Baile, trading as the Medford Grocery Company.

Contrary to the form of the Statute in such case made and provided and against the peace, government and dignity of the State.

(Signed) Geo. N. Fringer, The State's Attorney for Carroll County.

True Copy Test:

Levi D. Maus, Clerk.

[fol. 15] IN CIRCUIT COURT OF CARROLL COUNTY

Statement of Evidence

The records of the Circuit Court for Carroll County show that the following witnesses were subpoenaed on behalf of Smith Betts:

- Mary Emerson
- George Eula
- Mrs. Libby Eula
- Catherine Stephens
- Mrs. Fletcher
- Willie Fletcher
- Virginia Fletcher
- Buck Pryor
- Lige Painter
- Charlie Renner

They also show that the following witnesses for whom subpoenas were issued, were not summoned:

- Robert Evans
- Kenneth Emerson
- Robert Swartz

It also appears from the records of the Circuit Court for Carroll County that the summons for Robert Evans arrived at the Sheriff's Office at 11:30 a. m. on the day of the trial and therefore could not be served in time.

The following testimony was heard in the case of State of Maryland v. Smith Betts, in the Circuit Court for Carroll County, before the Honorable William Henry Forsythe, Jr., without a jury, at the Court House, Westminster, Carroll County, Maryland, on May 17th, 1939.

Counsel present for the State: George N. Fringer, Esq., State's Attorney.

No appearance for the defendant.

Norman Bollinger, a witness produced on behalf of the State of Maryland, after having been duly sworn according to law testified as follows:

By Mr. Fringer: On December 24th, 1938, I was working at the Branch store of Medford Grocery Company in Carroll County. On that evening, as I was closing the store and coming out, at about five minutes after five, I walked to my car to get in. A car pulled up and slowed down; and I thought it was another customer, and as I was going to

back to wait on them, I threw the envelope containing what I had taken in that day on the front seat of my car, and held the change bag in my hand. The other car pulled up, slowed down and stopped, and a man walked around it, drew a gun out of his right overcoat pocket, and asked me for my money. First he asked what I had in the bag. I don't know just whether I said nothing or just how I said that but he asked me to hand it over and I said nothing doing, and he said, "You are not telling me that," and I don't know whether it was the safety or the hammer or what I heard click. He had his hand over the back part of it and I said, "Well, I guess it is the best I could do," and I handed the money over and he turned around to his 1930 Chevrolet Coach, with a green body and red wheels, and I thought of looking at his license number but it was covered or awful muddy and I couldn't make out the number. I went right over to the phone and phoned both ways to watch the road to see if they could see that car.

It was fairly dark but I could see that the man had on a dark overcoat and a handkerchief around his chin and a pair of dark amber glasses. The handkerchief was not over his chin. He also had on a hat. I am employed by Medford Grocery Company, and he got the change bag, which had exactly fifty dollars in it. There was another fellow in his car with him but I couldn't identify him because his car was opposite mine and I didn't see him, and he stayed in the car and kept it ready to get away, and he didn't get out of the car.

After they left I called the authorities both in New Windsor and Westminster, to get help as quickly as I could. Subsequently I was called to jail, where the State police asked me if I could identify this man. I told them that I wasn't sure I could identify him without the glasses and the handkerchief, after seeing him when it was almost dark that evening. Smith Betts put on the glasses and then I could identify him.

[fol. 17] : Court: Q. Did you identify him?

A. Yes, sir.

Q. Are you positive that is the man?

A. Yes, sir.

Mr. Fringer: Q. Before you saw Smith Betts over at the jail, did you hear anything? Did you hear him speak or anything like that?

A. Yes, sir, as we stood out in the hall they had him in there and asked him questions to see if I could identify his voice. I told them before he had an awful determined voice, rough sort of voice, and I could identify that as I stood in the hall as the voice that was there that evening.

Q. Who were there with Betts over at the jail, which officers were there?

A. Sheriff Shipley and Officer Mason and Chief Deputy Mathias was there.

Q. He was with them when you came in and saw him?

A. Yes, sir.

Court: Q. You had never seen this man before?

A. Not before, until then.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

Defendant: Q. Mr. Bollinger, the night of the 24th you said that I was supposed to be dressed in a dark overcoat?

A. Yes, sir, dark. Of course, they had gray on you down here, but it was dark.

Q. Then you identified the gray overcoat to be the dark one?

A. I identified that to be the coat.

Court: Q. You mean the coat he had down here?

A. Yes, sir, because it was bagged at the pockets and everything the same as it was when he was over there that night?

Q. Was it dark gray or a light gray coat?

[fol. 18] A. Dark gray.

Defendant: Q. Was you close enough to tell whether my pockets was worn?

A. I couldn't tell whether they were worn but they were bagged. All I could say that they were bagged at the bottom. I couldn't tell you whether they were worn or not.

Q. Bagged at the bottom?

A. Yes, sir.

Q. Did you say he took the money or did you hand it to him?

A. I had to hand it to him.

Court: Q. Did he have the gun pointed at you?

A. Yes, sir.

Q. Did you see the gun?

A. Yes, sir.

Q. What kind of gun was it?

A. Well, I can't say. It looked like a 22 caliber to me.

Q. Could you tell whether a pistol or what?

A. It looked like a pistol to me—a revolver that has a cylinder in that goes around. That is what it looked like but he had his hand over the back part.

Q. He pointed that directly at you?

A. Yes, sir, right at my stomach. He held it right down at his side.

Examination concluded.

FRANK MILLER, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. Fringer: I live at Medford, and on December 24th, 1938, I was at the Medford Grocery Company's store at the oil and gas department between four and five o'clock. [fol. 19] I saw Smith Betts there. As I was going to the storeroom he walked up and said, "Where is the oil man?" in a rough manner. I said, "He is right in here." He came in, him and this other fellow followed him. I couldn't identify the other fellow at all because I didn't notice him in particular. He said, "I want a half gallon of oil without any top on it." By that I didn't know what he meant, of course. I didn't pay much attention to it and I was standing there waiting to pay my bill for stuff and gas out of the dollar bill in my hands and he spoke up and said he didn't believe dollars was very hard to get around there; there seemed to be plenty there. Of course, I began to think something was wrong and then I put my hand back on my pocket book and that is about all I could tell.

Q. Did you see him any more?

A. No. I went on up to the main store after some oysters.

Q. Where was he as you left?

A. Still at the Oil Department.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

Q. Mr. Miller, would you tell just how I was dressed?

A. No, I can't just tell, but you were so close to me I could identify you. You were right against me, pretty near. I looked at your face.

Court: Q. What time of the day was that?

A. Between four and five o'clock. I just can't tell exactly now. It was at the Filling Station, there at the Oil and Gas Department.

Q. Is that close to the store where this other man was working?

A. The man held up?

Q. Yes.

[fol. 20] A. No, sir, not so close.

Q. How far from it?

A. I can't tell you how far. About—well, it is not a quarter mile.

Examination concluded.

HARRY W. POOLE, a witness, produced on behalf of the State of Maryland, after having been duly sworn and examined according to law, testified as follows:

Direct examination.

By Mr. Fringer:

I work for the Medford Grocery Company, and about closing time on December 24th, 1938, I saw Mr. Betts in the main building of the grocery department where I worked. He was with another fellow and they bought a few things. I am sure that it was Smith Betts, because I have known him before. His father used to live and farm not very far from where I lived. I hadn't seen him for four or five years, but I have no doubt that it was he.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

"I could identify the clothes you had on and I knowed your voice as soon as I heard it. That was the first thing that drawed my attention to you, your voice. It may be possible that I haven't seen you since 1923; I couldn't tell you just how long its been; its been a long time, I know that."

Examination concluded.

LINWOOD DUTY, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. Fringer:

On December 24th, 1938, at about four thirty to five o'clock, [fol. 21] I worked in the Oil and Gas Department of the Medford Grocery Company, about twenty-five yards from the main store, and saw the man Smith Betts on that day.

Q. Just explain under what circumstances you saw him?

A. Well, he came in and I was very busy at that time. He came in my department I run and he came in in kind of a rough voice and had a whole lot to say. I mean, I noticed the man. I was busy at the time but I noticed him by the way he came in. I heard him say, "Where is the oil man" and this Mr. Miller spoke up and said, "Right here." And then he said it in a rough voice and I looked up at the man. I was down behind the counter waiting on Mr. Miller at the time and this Mr. Miller and him kind of got in a conversation about money. He talked as if it was plentiful and easy to get and then this Mr. Miller and him kind of got in a conversation about this dollar he was going to pay me for what he got. When I was finished waiting on Mr. Miller I walked around and asked Betts what he wanted. He said, "I want a half gallon of oil with the top off." That is the very words he said. I drewed this oil and taken it out and put it in his car. His

car sat up, I would say 20 yards from my department, up on a little grade like.

Court:

Q. What kind of car was it?

A. I never noticed. I was busy at the time and I never noticed in particular about the car, but I know around a '30 or '31 Chevrolet. Both them models are so near alike they are a little hard to tell apart.

Q. Did you notice the color of the car?

A. If I remember right I think it was green, with some color wheels, but I just never noticed exactly. I know it was pretty dirty and muddy. It had a good bit of mud on it. [fol. 22] Q. Did this man appear to be drinking?

A. Well, his appearance and the way he came in there seemed like the way he talked, I would judge he was drinking. Of course, I didn't smell anything on him. I didn't get that close to him. He didn't talk to me for a while. The man with him paid me for the oil, 25¢ for a half gallon. He came down to the counter and paid me and Betts stood up on kind of an offset on the concrete wall and he was talking over different things all the time. As for the conversation, that is what he said, but he said enough I noticed him pretty close. That was the words he said about the oil—"I want a half gallon oil with the top off". That was a strange thing for a man who wanted oil to say anything like that. He was dressed in an overcoat but I can't tell you exactly the color of it. This man with him he was not quite as tall as he was and a little heavier built.

Mr. Fringer:

Q. Are you sure he is the one?

A. He is the one with this other fellow. I never noticed when they left which one was driving. I went back in my department and went to work.

Q. Did you notice which way they went?

A. They went out the other way but I never noticed who was driving. They went out towards the branch store, out that way. That was between—I imagine around a quarter-of-five, four thirty or quarter of five. I know it was getting close to closing time. We close at five o'clock.

Examination concluded.

B. C. MASON, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. Fringer:

Q. You are Officer B. C. Mason of the Maryland State Police?

[fol. 23] A. Yes sir.

Q. Do you know anything about this case of robbery that happened on December 24, 1938?

A. This robbery was reported on the 24th. During the course of this examination I learned that Betts was in the vicinity of New Windsor on a Thursday, on the 22nd, he and another fellow by the name of Dunn. I also learned from one of the witnesses that Betts was in the store, although I didn't see him there.

Mr. Fringer:

Q. Tell what happened when you first saw him?

A. Well, we went to Hagerstown and picked him up and brought him back to jail here and the witness, the boy that was held up and Mr. Poole in the store, they were both over there and before they had seen him they were put out in another room and we brought him out of the jail and we talked to Betts and the boy that was held up, as we came in there, he identified him first by the voice, as the voice that told him to put his hands up. Then we put this dark gray overcoat on him and the pair of smoked glasses and then brought the boy out that was held up and Mr. Poole, and they identified him. The boy identified him as being the man that held him up there at the store that day. That is about all I could tell you.

Q. Did Betts say anything or make any statement when you arrested him or over at the jail in the presence of these men?

A. He had denied throughout of being involved in this holdup.

Q. He never admitted it?

A. No, sir. He admits being down here on Thursday, down to Baltimore, with this man Dunn, and going back to

Hagerstown the following morning, but not as to having anything to do with this holdup.

Direct examination concluded.

Defendant: No question. He told a straight story.

WALTER L. SHIPLEY, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination:

By Mr. Fringer:

I am the sheriff of Carroll County, and I was with the officer when Betts was arrested. I also was at the jail when Mr. Poole and the others identified Betts. At that time I put the boy Bollinger out in the hall, and talked with Betts before they saw him, and Bollinger shook his head like as if he recognized the voice. And then Mr. Frank Miller came down several days later and identified him. They said they could identify the man at the store. I think there were eight or ten in the jail, and I said, you boys go back and see if you can pick him out of the bunch. Of course, immediately when they walked back, they picked him out.

Direct examination concluded.

Cross-examination.

By Smith Betts, Defendant:

I cannot remember the conversation which I had with Mr. Poole the day he was in the jail and identified you.

Court: He wants you to tell what Mr. Poole said.

A. I just cannot remember the exact words.

D. Could you recognize it if you heard the words spoken?

A. I couldn't say for sure.

Court: You can ask him what he said.

Defendant:

Q. Do you remember, Mr. Poole, looking at me a minute and saying: "Yes, I think that is the man," and then a

second remark was made and he said, "Yes, I believe that is the man."

• A. Now, he might have said that. I wouldn't contradict that because I don't just remember.

Examination concluded.

J. WESLEY MATHIAS, a witness, produced on behalf of the State of Maryland, after having been duly sworn according to law, testified as follows:

Direct examination.

[fol. 25] By Mr. Fringer: I am Chief Deputy Sheriff of Carroll County and I was in the jail the day Messrs. Poole and Bollinger were brought in to identify Smith Betts. Smoked glasses were put on Betts' eyes and a handkerchief around his neck like the man was supposed to have had that did the holding up, and Bollinger and Poole identified him as the man that held them up. Betts was talking inside and Bollinger recognized his voice in the hall before he saw Betts.

Direct examination concluded.

No cross-examination.

Mr. Fringer: That is all, your Honor.

Court: Now Betts, you can call your witnesses.

Testimony Produced On Behalf of the Defendant

MARY EMERSON, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination:

By Smith Betts, Defendant: On the 24th of December 1938 Mr. Betts was home all day Saturday, that is he was in Hagerstown. I saw him around four or four thirty and later between six and seven o'clock.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: Are you sure it was the day before Christmas?

A. Yes, sir.

He was home on the day before Christmas and was home all day up until along about four or four-thirty. He goes down the street and gets the groceries and then comes back. About five o'clock Mrs. Fletcher come over and asked him to do a favor for her and I went instead of him. Then about five-thirty when we came downstairs to go out the wife of the people we rent from was gone out, and then we went down the street and he got a shave and hair cut and then come on down after me to come home and we was back home anywhere from nine to ten o'clock.

The witness then continued as follows: Smith Betts has no occupation. He was applying for work on W. P. A. He and I live together, but we are not married.

Examination concluded.

[fol. 26] GEORGE UHLER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination:

By Smith Betts, Defendant:

Q. Mr. Uhler, just tell the Court just what taken place on Friday and Saturday, December 24th?

A. Well, Friday you were down the street a good bit but on Saturday you were around the house pretty near all day because you were complaining about having a headache and not feeling so good. At this time that was supposed to have been the robbery he had went to Mr. Renner's store for some potatoes and lard, and that was around four-thirty in the evening and then he came back just about five o'clock. He was gone about a half hour. He was around the house up until about eight o'clock and then him and the woman he lives with went down the street and then they came back about quarter-of-ten.

Q. Just tell them what happened and what took place on Friday after dinner? Just what I done Friday after dinner?

A. He rents the room from me up there and he got a check from the Welfare for \$10 and he owed me some rent and after dinner I went with him down the street and he got the check cashed and he gave me \$5 towards the rent and then me and him was together down the street all afternoon on Friday and we came back about four o'clock in the evening.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: I rent a room in my house to Smith Betts. I work on W. P. A. We do not work on Saturday. I have seen Dunn, who owns an automobile, but I had not seen him for more than a week prior to Christmas. I had known Smith Betts for about a year, and he had been living with me since last September. We do not work together on W. P. A. He worked for farmers, cutting corn and such things, off and on.

[fol. 27] I worked on Friday and my wife told me that Betts was there on that day, but I myself saw Betts in Hagerstown on Saturday.

Court:

Q. When did you go on Friday to have this check cashed?

A. Sir?

Q. You said you went with him on Friday to have the check cashed. What time?

A. Are you sure that was Friday or Saturday?

Defendant: It was Friday, George.

Court: When was it?

A. I couldn't say. It was one of the days. It couldn't have been Friday because I was working.

Q. You said on direct examination it was Friday and then you were with him after that all the time. Now what is right?

A. Well, I couldn't say what day it was because he paid me the money, but I don't know what day it was. He got the check from the Welfare and he gave me half of it for rent.

Examination concluded.

LIBBY UHLER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination:

By Smith Betts, Defendant: I saw Smith Betts in and around the house all day the Saturday before Christmas of 1938, that is up until I left the house, about five thirty in the afternoon.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: I know that it was about five thirty on the Saturday before Christmas because I left the house to buy the children some toys. I had not done my Christmas shopping earlier because I had no money, and on that day Smitty gave me \$5 out of his Welfare check, to go downtown [fol. 28] on Saturday evening to get the children's toys with. That is he gave it to my husband sometime Friday afternoon, after my husband came from work, because my husband gave it to me when I came from work in the evening.

I had seen the Welfare check before Smith Betts saw it. It was a Washington County Welfare check. The check came through the mail and I gave it to Smith Betts' wife, (that is the woman he was living with). I have known Smith Betts for about a year and half and I met him at Billy's Tavern. He came to live in our house shortly after school started in September 1938. I have seen Smith Betts in his brother's automobile, but I never saw him in an automobile owned by Dunn. I do not know whether he has dark glasses, but he owned a real light gray overcoat which was not in bad condition.

I did not see him with any money after Christmas but he gave my husband half of his welfare check before Christmas.

My husband rented the room to him with my permission although he knew that he and the woman he was living with were not married. They have lived together for about three years.

Examination concluded.

WILLIAM FLETCHER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination.

By Smith Betts, Defendant:

Q. Mr. Fletcher, just tell them what you know about Saturday or anything you know about it?

A. Well I know Mr. Betts was home on Saturday, the day before Christmas, because I wasn't working that day and I live next to him. I know he was there until four o'clock because I went down the street and then I didn't see anything of Mr. Betts until Christmas morning.

[fol. 29] Court: Q. You saw him at four o'clock?

A. Four O'clock Saturday evening, yes, sir. When I left home, I went down town. It was late in the night when I came back and I didn't see Mr. Betts because I guess he was over in his room. Mr. Betts was there early on Christmas morning because I called him and got a cigarette from him. I offered him a drink of beer out of a beer bottle and he said he didn't want any. That is about all I know about it.

Direct examination concluded.

Cross-examination:

By Mr. Fringer: I am sure that it was around four o'clock because I looked at the clock. I know Dunn that Betts goes around with and he owns a 1928 Chevrolet with blue body and black fenders. I work on W. P. A. but I wasn't working on Saturday before Christmas. I live with my mother and I have several brothers and sisters. I am sure that I saw Betts the Saturday before Christmas, because my brother was there at the time, and he came up the Saturday before Christmas. I saw him also on Christmas Day, asked him if he wanted a drink of beer, and he said "No." I do not own a car. Ells Dunn lives up on Honey Hill, and I have known him for three or four years. I am not related to Smith Betts.

Examination concluded.

MRS. WILLIAM FLETCHER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law testified as follows:

Direct examination.

By Smith Betts, Defendant:

Q. Mrs. Fletcher, just tell the Court just what you know about me and where I was at the 24th?

A. Well, I know you was home the whole day, or was backwards and forwards to your room, except when you went out to the store and got some potatoes and some lard [fol. 30] and some bread and then come in and then I come over and asked you to do me that little favor at five o'clock—and I looked right up at the clock. I thought they were all gone down town and I would do this little trick while they were gone and I come and asked you to do it for me and you said your head hurt and that you felt bad, and you had told me that several times during that day, that your heat hurt you, and you said, "Let Mary go," and she was peeling potatoes and then I got her to go and she come back while I went to my room. Then around about eight o'clock, or between seven and eight, you came down stairs and went out, and then around ten o'clock you came back. That is all I know about it.

Court: What day was this?

A. On Saturday, the 24th of December.

The witness then continued as follows:

My son rented a room from Mr. Uhler and we moved in there about the first of December of 1938, and I saw Smith Betts in and around the place all day long. He had no work at that time. I wanted Betts on the Saturday before Christmas to go down and get me a bottle of beer. The rest of them kicked about me drinking a bottle of beer and I asked him to go. I went downtown the Friday before Christmas, but I did not go out on Saturday evening. I did not see him with any money on Christmas day. He did not get me the bottle of beer, but Mary Emerson did, and that was the only beer I had on that day. I didn't want the others to know that I was drinking beer, and that's the reason I asked Betts to get the beer for me before my son

came back from downtown, and I looked at the clock at that time.

Examination concluded.

CHARLES RENNER, a witness, produced on behalf of the Defendant, after having been duly sworn according to law, testified as follows:

Direct examination.

By Smith Betts, Defendant:

[fols. 31-32] To the best of my knowledge, Smith Betts came in my place at a quarter of twelve Saturday night December 24, 1938 and stayed there until about quarter of one. I don't remember seeing him earlier in the afternoon. I couldn't tell whether he spent much money, because I just picked up what was lying on the table where they paid for the goods as they got them, and I don't know who put it down.

Examination concluded.

Smith Betts, Defendant: That is all.

Court: Do you want to take the stand?

Smith Betts: No, sir. I have no more to say.

(Case concluded.)

At the conclusion of the case, Smith Betts was sent to the Maryland House of Correction for a term of eight years.

On June 5, 1941, Smith Betts, on his own behalf filed a petition for writ of habeas corpus before the Honorable Joseph D. Mish, Judge of the Washington County Circuit Court, at Hagerstown. The writ was issued on June 5, 1941, and the hearing was had on June 17th, 1941.

On June 17th, 1941 Smith Betts was returned to the custody of the Maryland Penitentiary.

The present petition for writ of habeas corpus was heard on September 26, 1941 and on October 6, 1941 the Honorable Carroll T. Bond, Judge, filed the following opinion:

[fol. 33] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

OPINION—October 6, 1941

Betts, a prisoner in the Maryland Penitentiary prays the writ of habeas corpus to compel his release because on his trial, on May 17, 1939, the court refused to appoint counsel for him at his request. He was held for trial on a charge of robbing a grocery store attendant in Carroll County at the point of a pistol, on December 24, 1938, pleaded not guilty, and after having first prayed a jury trial withdrew that prayer and prayed trial by the court, and upon testimony taken was convicted. He had before the trial stated that he was unable to employ counsel for himself, and on that ground requested that the court do so, but the court declined, as it regularly provided counsel only in cases possibly capital. There is no statute governing the furnishing of counsel, and the courts of the various state jurisdictions differ somewhat in practice.

On June 17, 1941, he obtained a first writ of habeas corpus from the Hon. Joseph D. Mish, in the Circuit Court for Washington County, summoned twelve witnesses and argued his case, including the same point now raised, although he appears then to have pressed chiefly an objection that some witnesses desired for the defense on his trial had not been summoned by the sheriff, an objection on which the court found against him on the facts. He had no counsel for that first application for the writ, or for the hearing.

[fol. 34] The effect of the Act of 1941, chapter 484, on an application for a second writ has been argued. Counsel now furnished to the applicant prepared and had signed merely an order directing the warden of the penitentiary to show cause why the writ should not issue, a practice so far unknown in Maryland, but one that seems to me proper since the passage of the act. It has long been the requirement that a judge to whom application is made should "forthwith grant the writ of habeas corpus". Code, Art. 42, sec. 3. But the recent statute provides that this shall not be done if it appears from the complaint and docu-

ments attached that the petitioner is not entitled. And it has repealed the previous section 14 of the Code article which gave a right of action against any judge who might refuse to issue the writ. In the federal jurisdiction the similar qualification, that the writ is to be denied when it appears from the petition that the applicant is not entitled, has been held to justify the use of an order to show cause. *Walker v. Johnston*, 312 U. S. 275, 284; R. S. 755, U. S. C. 455. And there seems to be another reason for its use in the fact that the Maryland Act of 1941 has been, notoriously, passed to put a check to the career of a prisoner who, under the former practice of granting the writ repeatedly, without limit to the number of times, (*Bell v. State*, 4 Gill, 301, 304), had in recent years applied for sixty or seventy in [fol. 35] succession, with the object, possibly, of relieving the monotony of his confinement by journeys to and from judges about the State.

There is now no specific statutory denial of a right to repeated writs, and no specific allowance of it. The statute, (section 3), refers only to a single instance of complaint and application. It seems to me, however, that the amendments made could not fairly be said to show a legislative purpose to depart so far from the former practice as to deny all power to issue a second writ. At the same time I cannot believe the Legislature could fairly be considered to have intended leaving the frequent applicant mentioned at liberty to continue obtaining writs indefinitely merely by omitting from his applications any showing that he is not entitled. My conclusion is that a judge would be acting in accordance with the purpose of the statute if he should accept the decision on a first writ as a sufficient adjudication on the complaint and refuse to issue a further one, or, having issued it, should remand the applicant—unless some extraordinary cause is shown against that action. This would require the exercise of some judgment on the second application, and because of that fact an order that cause be shown seems appropriate.

The objection here is that there was a denial of constitutional due process of law in the lack of counsel appointed by the court. The defect, if it was one, still existed at the time of the hearing on the first writ. And in this there seems to me to be a reason for hearing the second application, now that the point is taken up with the assistance of counsel. I think I am required to

consider the ground as all one, continuing through the hearing on the first writ, and now newly presented. Judge Mish agrees with me that I should do so.

Under the decisions of the Court of Appeals of the state, it is not a proper ground for action on a writ of habeas corpus; an appeal would be the proper method, and there has been no appeal. *Bell v. State*, 4 Gill, 301; *State v. Glenn*, 54 Md. 572, 607; *Lancaster v. State*, 90 Md. 211, 215. Possibly the petitioner could not have prosecuted an appeal in time. The Supreme Court of the United States has in some decisions in recent years given an extended function to the writ on a theory that although jurisdiction generally of cases of the kind existed below at the outset, it was lost in particular cases by departures from due process of law, and judgments rendered become nullities, to be disregarded on hearings upon the writs. *Powell v. Alabama*, 287 U. S. 45; *Johnson v. Zerbst*, 304 U. S. 458; *Avery v. Alabama*, 308 U. S. 444; *Walker v. Johnston*, 312 U. S. 275; *Smith v. O'Grady*, 312 U. S. 329. But there has been suggested here a question whether a Maryland state judge is authorized to make a like extension of function for the state writ in the face of the cases which have limited it. If this is done the writ might sometimes be used to supplant the regular method of appeal, with its advantage [fol. 37] that an error may be corrected by a new trial rather than by a complete discharge of the accused. Resort to the federal writ was suggested as the proper method. But the point may be passed in this case for I do not see a lack of due process of law on the theory of the Federal jurisdiction. See *Smith v. O'Grady*, 312 U. S. 329.

The case is initiated by an organization interested in such questions, to test a contention that, according to the decisions of the United States Supreme Court already cited, when any person convicted of a criminal charge has been unable to employ counsel for himself, and the trial court when requested has refused to employ counsel for him, there has been in his conviction a lack of constitutional due process of law which renders any imprisonment unlawful, and requires his discharge. In the statement of the contention no distinction is allowed between criminal charges of different magnitudes, or in respect to courts. Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require

the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it. And there is express acceptance of the consequence that as the Fourteenth Amendment to the United States Constitution commands the protection of due process of law for property as well as for life and liberty, counsel would also need to be furnished in civil cases involving property, as in condemnation [fol. 38] proceedings, perhaps in replevin suits. It is thought to have been decided in effect that in none of these cases can there be a trial with due process of law unless there is counsel for the defendant.

It seems to me the decisions cited are not to be so construed. There is no need of inserting a study of them here; the court on appeal would not be helped by it. But my conclusion is that in the cases in which discharges were found necessary because of a lack of the due process, there was either a peculiar helplessness and need in the defendants, or, because of other facts and conditions, an intolerable degree of unfairness. It has in each case been largely a matter of degree. And in measuring this the Supreme Court has rehearsed and analyzed the circumstances of each case for itself. "The decision (in *Powell v. Alabama*, 287 U. S. 45), turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing". *Palko v. Connecticut*, 302 U. S. 319, 327. "The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist." *Boyd v. O'Grady*, 121 Fed. (2d.) 146, 147.

That every presiding judge will care for the interests of a defendant in every case if he is without counsel is, as argued, doubtless illusory. The argument that he can never do so is perhaps logical, but not always true, I think. I have been struck by the care exercised even by prosecuting [fol. 39] attorneys for the interests of prisoners who have had no counsel, at least so far as eliciting the truth in their favor has been concerned. Trials without counsel are less contentious, and especially when trial without jury is elected, as is usual in Maryland, are more informal. Certainly my own experience in criminal trials over which I have presided, (over 2,000; as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners. And I think the Supreme

Court on a complaint of lack of due process has meant to discriminate.

The issue tried in the present case was one of identity of the robber. There was no dispute of the robbery. The testimony of four men who were at the time at work about the store seems to leave no room for doubt of that. And these four witnesses testified to the defendant's identity as the robber, two of them from the appearance of the man alone, and two from his appearance and his voice, which, as exhibited on the hearing on the present application has enough peculiarity in it to aid in identification. One of these witnesses, Poole, had known the man when he lived nearby in Carroll County. Betts produced six witnesses from Hagerstown, some of whom lived in the house with him, and some nearby; and they all testified to an alibi at the time of the robbery. Betts himself declined to take the stand.

It is sufficiently proved that Betts was unable to employ counsel. But in this case it must be said there was little for counsel to do on either side. The fact of the robbery [fol. 40] could hardly be disputed, as said. Betts briefly cross-examined the witnesses who identified him, and the situation seems to have been such that counsel could have done little more than prolong the cross-examination without advantage. And witnesses called by Betts needed no support by counsel. The problem presented to the trial court on the facts was a common one, and the decision of the judge, who saw the witnesses, could not be held wrong.

There was no helplessness in the accused. He is forty-three years old, and appears to have at least an ordinary amount of intelligence, and the ability to take care of his own interests on a trial of this narrow issue. I conclude that there is no such case as the Supreme Court of the United States would hold lacking in due process of law.

I have procured a transcript of the court stenographer's notes of the testimony at the trial, as I thought this necessary if the circumstances of the particular case were to be considered; and I make it part of the record on this application.

Counsel for both parties state that they do not wish any further argument before final action, and I shall therefore issue a formal writ, but sign an order declining to discharge the man from custody on it, and remanding him. The

record for an appeal I shall have to certify myself, as on an application for the writ of ~~habeas corpus~~ I am a judge without a court.

Carroll T. Bond.

[fol. 41] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

In the Matter of the Application of SMITH BETTS for the
Writ of Habeas Corpus

ORDER—October 6, 1941

The application of Smith Betts for release from custody of the Warden of the Maryland State Penitentiary upon the writ of habeas corpus having come on to be heard upon the papers and testimony taken, it is this 6th day of October, 1941, ordered that the writ issue, but the parties agreeing that final action be taken upon the hearing so far had, without further hearing in this jurisdiction, it is further ordered that the said Smith Betts be and he is hereby remanded to the custody of the said Warden.

Carroll T. Bond, Judge.

[fol. 42] BEFORE THE HONORABLE CARROLL T. BOND, A JUDGE
OF THE STATE OF MARYLAND

CERTIFICATE TO RECORD

STATE OF MARYLAND,

City of Baltimore, to wit:

I hereby certify that the foregoing is a full and true copy of the docket entries and transcript of all papers filed with me as a Judge of the State of Maryland, being Chief Judge of the Court of Appeals of Maryland, one of the Courts of Record of the State of Maryland.

In witness whereof I hereto set my hand and affix my seal this 17th day of December 1941.

Carroll T. Bond, Chief Judge, Court of Appeals of
Maryland:

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 16, 1942

The petition herein for a writ of certiorari to the Honorable Carroll T. Bond, a Judge of the State of Maryland, being a judge of the Court of Appeals of Maryland from the City of Baltimore, is granted.

Counsel are requested on the argument of this case to discuss the jurisdiction of this Court, particularly (1) whether the decision below is that of a court within the meaning of Section 237 of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any other state court, have been exhausted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8971)

MICRO CARD

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